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IN THE

Supreme Court of the United States

October Term, 1959

No. 1144

[redacted],

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

[redacted]
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in the above case on September 24, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of Franklin County is unreported and is printed in Appendix B hereto, infra, p. 8. The Supreme Court of Ohio dismissed the appeal as of right on the grounds that no substantial Constitutional question existed herein. The decision is unreported and is printed in Appendix B hereto on p.

JURISDICTION

Judgment of the Ohio Supreme Court was entered on September 24, 1970. The jurisdiction of this Court is invoked under the provision of 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

I.

Where evidence which is relevant and material to the charges against the defendant was seized in violation of defendant's rights under the Fourth Amendment, is introduced into evidence against defendant, is described extensively by numerous witnesses and photographs of the evidence and parts thereof are physically introduced before the jury, does the admission of such Constitutionally tainted evidence constitute prejudicial error to the defendant.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provision involved are the Fourth and Fourteenth Amendments to the Constitution of the United States and printed in Appendix A, below p. 6.

STATEMENT OF THE CASE

On July 17, 1967, police officers, F.B.I. agents and others entered onto the premises occupied by defendant with a defective search warrant and under a Columbus, Ohio, municipal ordinance and removed therefrom several parts of a 1964 Pontiac including doors, side panels, trunk deck, locks, etc. Sometime prior to this a 1964 Pontiac, being driven by the petitioner's daughter was seized by the Columbus Police Department. The defendant was indicted for four counts, charging him with procuring title to a stolen Pontiac, buying or concealing a stolen Pontiac, having in one's possession a Pontiac upon which the serial number was removed for the purpose of concealing the identity, and making a false statement for the procurement of a Certificate of Title.

Defendant entered a plea of not guilty and in accordance with the Ohio procedure, filed a motion to suppress the evidence obtained as result of the search of the premises occupied by him on July 17. The trial court in its initial decision sustained the motion to suppress. Upon motion for reconsideration by the State of Ohio, the trial court set aside its previous ruling and overruled the motion to suppress on three grounds: One, that the warrant was not defective; Two, that any error in the warrant was cured because the defendant consented to the search upon being presented with the warrant; Three, that the Municipal Ordinance authorized the State to go and search his premises without a search warrant.

In the trial court evidence was introduced to establish a 1964 Pontiac had been stolen in Cleveland, Ohio, prior to the date listed in the indictment. Evidence was further presented that a 1964 Pontiac had been involved in a collision in southern Ohio and had been purchased in a damaged or wrecked condition by the defendant's

corporation. Testimony was then presented that the automobile being operated by defendant's daughter which was seized on the street of Columbus was, in fact, the stolen automobile but the identifying serial numbers found thereon were those of the wrecked automobile purchased by defendant's corporation. The parts removed from defendant's lot incident to the search were then introduced into evidence and identified by experts as actually being the remains of the automobile purchased by defendant's corporation. This testimony was based on such things as serial numbers, lock numbers, decals found on a portion of the parts, etc. Photographs of the parts removed incident to the search were coupled with the testimony on these parts which were then introduced into evidence and a jury returned a verdict of guilty on all four counts.

On appeal to the Court of Appeals, the Franklin County Court of Appeals ruled that the search of the premises occupied by defendant was in violation of defendant's rights under the Fourth Amendment of the Constitution and that it had been error to admit testimony and exhibits concerning the articles seized and removed. However, after much discussion of Ohio Procedures on harmless error, the Court of Appeals ruled that the error was not prejudicial; that the admission of the exhibits was harmless, concluding:

> "Assuming the exclusion from the evidence of that which pertains to the 1964 Pontiac parts, as obtained in the illegal search, the remaining evidence, which was uncontradicted, inescapably leads a rational mind to but one conclusion, and that of guilt.
> "We further conclude the error of inclusion committed herein did not affect the substantial right of this defendant, that such was not prejudicial, and such error was harmless beyond a reasonable doubt."

The Supreme Court of Ohio on appeal as a matter of right upon its own motion dismissed the appeal of the petitioner on the basis that the issue was not a substantial constitutional question.

LAW AND ARGUMENT IN SUPPORT OF PETITION

As indicated in the Statement of Facts on July 17, 1967, the Columbus Police officers and F.B.I. agents came to defendant's premises, served him with a defective search warrant and a copy of the Columbus Municipal Ordinance, ostensibly searching for a 1965 Chevrolet. Instead 1964 Pontiac parts were removed from the premises. A motion to suppress was duly filed and first sustained by the Court and upon reconsideration, overruled on the grounds that the warrant was not defective; that if the warrant was defective the defendant had consented thereto and the Columbus Municipal Ordinance gave the police authority to enter on the premises without a warrant to search abrogated the requirement for a warrant.

At trial photographs or slides of the parts seized as result of the search and the locks removed from some of the parts were identified and testified to extensively by numerous witnesses, the purpose being to establish that the automobile previously seized by the Police Department was, in fact, a stolen automobile and that the remains of the automobile which was legitimately purchased by the petitioner's corporation were still on his premises and consequently the automobile seized could not be the automobile purchased by the petitioner.

The Court of Appeals held that the search violated the defendant's rights relying on *Aguilar vs Texas*, 378 U.S. 108, *Bumper vs N.C.*, 391 U.S. 543; *Camara vs* [illegible]*uni-*

pal Court, 387 U.S. 523, and *See vs Seattle*, 387 U.S. 541. The Court then ruled that the admission of this extensive testimony and the exhibits was not prejudicial.

It is the petitioners contention that this presents a significant issue and is contrary to the rulings previously enunciated by this court. There can be no dispute but what the evidence admitted was relevant and material to the charges and carried weight with the jury in determining guilt or innocence of this defendant. Relevant here is the standard enunciated in *Chapman vs California*, 386 U.S. 18. This Court in *Chapman, Supra*, said at pages 23 and 24,

> "An error in admitting plainly relevant evidence which would possibly influence the jury adversely to a litigant cannot under Fahy be conceived as harmless."

Relevant also is the language in *Fahy vs Connecticut*, 375 U.S. 85, at 86 and 87,

> "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,
GEORGE E. TYACK
Attorney for Petitioner.

AMENDMENT IV

(SEARCHES AND SEIZURES)

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

(RIGHTS OF CITIZENS)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE SUPREME COURT OF THE STATE OF OHIO

1970 Term To wit: September 24, 1970

THE STATE OF OHIO,
City of Columbus
State of Ohio,

Appellee,

vs.

Edwin Melzer,

Appellant.

No. 70-150

APPEAL FROM THE COURT OF APPEALS
for Franklin *County*

This cause, here on appeal as of right from the Court of Appeals for Franklin *County, was heard in the manner prescribed by law, and no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court *to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for* Franklin *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this_____day of_____ 19____.

_____ *Clerk*

_____ *Deputy*

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 9416

STATE OF OHIO,

Appellee,

vs.

EDWIN G. MELZER,

Appellant.

ENTRY

This cause came on for hearing on the appeal of the defendant, Edwin G. Melzer, through counsel, of his judgment of conviction in the Court of Common Pleas on Four (4) separate counts involving his possession of, his concealment, and his attempts to procure certificates of title to a stolen 1964 Pontiac automobile.

This court, after full consideration of the Assignments of Error and Briefs, the Bill of Exceptions, and transcript of the original papers, and oral arguments by counsel on behalf of the parties, finds there is no error apparent on the record or judgment prejudicial to the appellant, all within and pursuant to the decision of the court herein.

Therefore, it is the order and judgment of this court that the judgment of the Court of Common Pleas should be and it is hereby affirmed and that this case is remanded to that court for execution upon the judgment in accordance with law.

To all of which the appellant, through his counsel, excepts.

s/ ROBERT E. HOLMES
HORACE W. TROOP
ROBERT E. LEACH
JUDGES

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 9416

STATE OF OHIO

Plaintiff-Appellee,

vs.

EDWIN G. MELZER

Defendant-Appellant.

DECISION

Rendered on December 9, 1969

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Columbus, Ohio 43215,
For Defendant-Appellant.

HOLMES, J.

This matter is an appeal of convictions of Four (4) separate counts against the defendant-appellant, Edwin G. Melzer, involving his possession of, and activities related to, a 1964 Pontiac automobile, or more precisely, his activities related to Two (2) 1964 Pontiac automobiles.

The first count upon which the defendant-appellant was convicted, was pursuant to Section 4505.19 (C), Revised Code, to the effect that he did procure or attempt

to procure a certificate of title for a 1964 Pontiac, knowing or having reason to believe, that such motor vehicle had been stolen.

The second count under Section 4549.04 (C), Revised Code, was to the effect that the defendant, on or about July 14, 1967, did unlawfully buy or conceal a 1964 Pontiac automobile that had been stolen, and knowing it had been stolen.

The third count upon which the defendant was convicted was under Section 4549.07, Revised Code, a misdemeanor, to the effect that on or about July 14, 1967, the defendant concealed, and had in his possession, a 1964 Pontiac from which the manufacturer's serial number was removed for the purpose of concealing or destroying the identity of said vehicle.

The fourth count upon which the defendant-appellant was convicted was pursuant to Section 4505.19 (E), Revised Code, to the effect that the defendant-appellant did on or about October 14, 1966, make a false statement in the application and affidavit for procurement of a certificate of title to a motor vehicle.

After indictment on the aforementioned counts, the defendant entered a plea of not guilty, and shortly thereafter the defendant's counsel filed a motion to suppress evidence consisting of certain automobile parts from a wrecked automobile obtained during a search of the Tracy Auto Parts, Inc., located at 1632 Refugee Road, Columbus, Ohio, such search and seizure having taken place on July 17, 1967.

At the initial hearing in the Common Pleas Court on the motion to suppress, evidence was developed that the affidavit upon which the search warrant was issued was sworn to by an Officer William Barnett to the effect that a 1965 Chevrolet 2 door, burgundy, Serial No. 164375 N 106003, was being kept at 1632 Refugee Road in the

City of Columbus, Ohio, for the purpose of "concealing said vehicle."

The affidavit on its face further sets forth that "The facts upon which such belief is based are as follows: Information received from an informant who has given me reliable information in the past."

Upon the basis of such an affidavit, a judge of the Municipal Court of Columbus, Ohio, issued a search warrant for the premises known as Tracy Auto Parts, Inc., 1632 Refugee Road, such warrant being issued for a search for "a 1965 Chevrolet, 2-door, burgundy, Serial #164375 N 106003, which is a stolen car from 2935 East Main Street."

The return of the warrant shows on its face that the office had found and returned Three (3) doors, Two (2) rear half sections, and a deck lid from a 1964 Ponitac.

Subsequent to such hearing on the motion to suppress, the Common Pleas Court entered its decision sustaining such motion on the following basis:

> "Section 2933.23 R.C. requires a search warrant to be issued only after an affidavit is filed, particularly describing the things to be searched for and seized. This was not done in this case.
> "We hold that this search on July 17, 1967, was conducted in violation of defendant's Constitutional rights. The evidence obtained as a result of this search is illegal and cannot be used in this case."

Following this decision by the Common Pleas Court, the State filed a motion to reconsider, whereupon the court vacated such prior decision sustaining the motion to suppress, and granted a further hearing on the matter.

At the second hearing on the motion to suppress, the defendant offered no further evidence, but relied upon the evidence previously submitted to the court which was the affidavit for the search warrant, the warrant, and the return.

The State then moved to dismiss the motion on the basis that there was not sufficient evidence relating to an illegal search and seizure, but the court did not rule on this motion and requested the prosecution to proceed with any evidence that it had relating to the search.

The State called Officer Barnett who testified that after obtaining the warrant from the judge of the Municipal Court, he went to 1632 Refugee Road with Four (4) other men, including Two (2) FBI agents and a man from the National Auto Theft Bureau. He stated that upon arrival at the premises, he went into the office and was met by the defendant-appellant, Melzer, who was the apparent operator of the business premises. Barnett then handed the defendant the search warrant and also handed the defendant a copy of Columbus Municipal Code Section 543.04, which grants police officers the right to enter garages and junk yards to inspect for automobiles believed to have been stolen.

The defendant, Melzer, apparently read the warrant and among other statements, said: " 'You don't need this. You can have anything in the place. Take anything you want.' " (R. 37)

The testimony on this second hearing to suppress further adduced that the 1965 Chevrolet, which formed the basis for the search warrant, and the search, was not found but various body parts to a 1964 Pontiac were discovered and were taken by the police after an itemized statement of such was signed by the defendant, Melzer.

The automobile parts were identified as coming from a car actually purchased by Melzer as salvage from one John L. Sullivan, the former owner who had wrecked the car.

It was further developed by Officer Barnett's testimony that on July 14, 1967, Three (3) days prior to the

search, the defendant's daughter, Connie Meiner, had been stopped by officers while driving a 1984 Pontiac which, when checked, was found to have been stolen from a man in Cleveland, Ohio.

Further, the officer testified that in running a title check on such car, the police had found that the serial plate had been removed, and one from a salvaged vehicle had replaced the original serial plate. Also, it was determined that the serial plate, as replaced, had been that which was issued to an automobile sold as salvage to Tracy Auto Parts, Inc.

Briefs were submitted by both parties on the question of the motion to suppress, and after taking such question under advisement, the court then rendered a final decision overruling the motion to suppress.

The lower court based its decision on the belief that there was a valid search warrant even though the affidavit for the search warrant was not in full compliance with Section 2933.23, Revised Code.

The language of the court is as follows:

> "The affidavit for search warrant was not in full compliance with Section 2933.23 R.C. in that it did not particularly describe the things to be searched for and seized, but the judge did issue a search warrant, and must have been satisfied that proper grounds existed for its issuance."

Further the court relied upon Columbus Municipal Code Section 543.04, as granting authority to the police officers to make a lawful search of the defendant's premises.

The lower court in its decision on the motion to suppress, further found that " • • • The evidence shows that defendant gave consent to the search which would have cured any technical defects in the search warrant."

Having found the search to be properly conducted and

valid, the court ruled that the articles found in such search became proper evidence for use in the trial.

On the morning of the trial, the defendant filed a motion to suppress all evidence in relation to the 1964 Pontiac seized by police from the defendant's daughter. A ruling was deferred on this motion and the trial proceeded whereupon Officer Barnett, as the State's first witness, explained the circumstances under which the Pontiac had been seized from the defendant's daughter.

Officer Barnett related that he had been told by a Donald Thompson, a former employee of Tracy Auto Parts, that the defendant had a number of stolen cars at his place of business. Barnett further testified that his notes indicated that Thompson had told him about a 1964 Pontiac, among other cars.

Additionally, Officer Barnett testified that in response to being told to remove her personal effects from the car, Constance Melzer pulled a .45 caliber automatic pistol out from under the seat. This gun was also seized at the police. Later testimony relative to the gun developed at the trial in that Officer Shartzer testified that the defendant, Melzer, came to the police station on several occasions and requested release of his weapon.

There was voluminous evidence offered on behalf of the State by way of proof to establish the guilt of the defendant on the charges of the indictment. First, there was submitted the testimony of Officer Barnett who made the original search; there was the testimony of Officer Schaub, a State Highway Patrolman, who testified as to an accident involving a 1964 Pontiac driven by a Mr. John L. Sullivan, which auto was demolished in such accident; Mr. John L. Sullivan testified that he had purchased a 1964 Pontiac Catalina in Titusville, Florida, in June, 1964, and that he drove the car until November,

1955, when he had the accident which Patrolman Schaub described. He further testified that after the accident he had sold the demolished automobile to Trzcy Auto Parts in Columbus, Ohio. Further Mr. Sullivan denied that the car seized from Connie Melzer was the one that he had sold to Mr. Melzer.

Officer Petrov of the Cleveland, Ohio Police Department, testified that on August 14, 1966, a 1964 Pontiac, 4-door, blue sedan, Serial No. 834 P 276334, had been stolen from a Mr. John Gambol. Mr. John Gambol testified as to the identifying features of his auto which had been stolen and that he had purchased such auto from Grabski Pontiac in Cleveland, Ohio, in June, 1964. He stated that the car was an all blue, 4-door Catalina.

There was extensive testimony given by Mr. Paul Gilliland, Assistant Manager of the National Auto Theft Bureau, Chicago, Illinois. He explained the function of his organization and procedures followed by it in maintaining records on virtually all automobiles manufactured and upon all known thefts of automobiles in the country.

The witness, Gilliland, testified that the one dissimilar thing on every vehicle was the identification or serial number, and that such was maintained in a hidden secret place on every car. He testified that he had examined, on Two (2) different days, the 1964 Pontiac impounded from Connie Melzer and that from the hidden serial number, the engine number, and the various lock cylinder numbers, he had determined that this car was actually the one stolen from John Gambol in Cleveland, Ohio.

Mr. Gilliland also stated that he had checked the records of his organization concerning the vehicle identification number found on the door frame of the car seized

from Connie Melzer. He learned that such number belonged to a car manufactured in Doraville, Georgia, which car had ultimately been shipped to Titusville, Florida, for sale.

A Mr. Joseph L. Taunt, Coordinator, Accounting Procedure, for the Pontiac Motor Division, testified that the Pontiac Company maintains all manufacturing records, and all invoices which show the initial transaction when the car is sold. He stated that records are prepared and maintained when the vehicle is assembled and a complete data processing record is built up.

Mr. Taunt confirmed the identity of each 1964 Pontiac involved in this matter. He also confirmed that the vehicle which was in the possession of the police was built in Pontiac and shipped to Grabski Pontiac in Cleveland, Ohio, and that the vehicle whose identification plates were being used on such impounded car, had been manufactured in Georgia and ultimately shipped to Titusville, Florida.

Mr. Taunt testified that there is a hidden serial number on all Pontiac cars and that this information is given to the National Auto Theft Bureau.

Testimony on behalf of the State was offered by a Mr. Donald Thompson; a former employee of Tracy Auto Parts, and who was the informant regarding the stolen cars located at the Refugee Road address.

He testified that when he went to work for Melzer he observed the latter driving a 1964 blue Pontiac Catalina, and he also remembered that at the same time there was a wrecked green 1964 Pontiac setting out on the Tracy Auto Parts property.

Further, Thompson testified that in March of 1967, Mr. Melzer ordered one of his employees to paint the top of the Pontiac he had been driving, which was done

in Thompson's presence. Thompson also stated that he had seen Mr. Melzer change the vehicle identification plates on the doorpost, and on the engine cowl, attaching such by the use of a pop rivet device.

Also, Thompson testified that up to the time he left the employment of Tracy Auto Parts he saw Mr. Melzer using this car in the altered condition, and also that up to the time he quit, the wrecked green Pontiac auto had remained on the Tracy Auto Parts yard.

At the conclusion of the State's case, the defense renewed both of its motions to suppress and also made a motion to dismiss all of the counts in the indictment, all of which was overruled. No evidence was submitted by the defense and no witnesses called.

A verdict of guilty was returned on all Four (4) counts of the indictment.

A motion for a new trial was filed and was thereupon overruled by the trial court, and judgment was entered upon the verdict. From this judgment, the defendant brings this appeal alleging Ten (10) assignments of error.

The first assignment of error which was divided into Three (3) branches is as follows:

"I. The trial Court erred in overruling the defendant's motion to suppress certain articles seized on his premises at 1632 Refugee Road on July 17, 1967, and in permitting testimony concerning the articles so seized, all in violation of the defendant's rights under the Fourth and Fourteenth Amendments to the Constitution of the United States.

"(a) The search warrant used by the officers failed to meet the standards of probable cause required by the Constitutions of the State of Ohio and the United States, and failed to describe the articles taken.

"(b) The purported consent of the defendant to the search, after having been served with a warrant, does not render the illegal search lawful.

"(c) The provisions of the Columbus Municipal Code cannot be utilized as a basis for justification of an otherwise unlawful search."

As to this assignment of error, we are in the rather unusual position of finding that the trial court erred in overruling the defendant's motion to suppress certain evidence, but compelled to conclude that such error was not, in this case, prejudicial to the defendant, and, therefore, the allowance of such evidence was not reversible error.

I (a)

We agree that the search warrant issued to the officer on the basis of the aforestated affidavit failed to meet the standards of probable cause required by the Constitution of the State of Ohio and the Constitution of the United States. Nor did such affidavit comply with the requirement of Section 2933.23, Revised Code.

Section 2933.23, Revised Code, provides as follows:

"A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing such warrant."

Testing the affidavit in this case in light of the statute here quoted, we find that it fails in several respects. First, the affidavit does not comply with the statute in regard to alleging substantially the offense in relation

to the thing to be seized in such search. The affidavit set forth the statement that the affiant believed that a 1965 Chevrolet was being kept on the premises "* * * for the purpose of concealing said vehicle."

We hold that such a statement does not substantially allege an offense in relation to such subject of the search, and the fact that language was in fact included on the warrant as issued which would constitute an offense, does not of itself cure the faulty affidavit in this regard, in that the officer would not have sworn to his belief of the commission of the crime.

Section 2933.23, Revised Code, is specific in its requirements that certain additional facts must be set forth which provide the basis upon which a search warrant may be issued.

There must be set forth in some particularity the facts upon which the affiant based his belief that the subject matter of the search was on the premises.

The requirement of probable cause as contained in Section 2933.23, Revised Code, has been considered in a number of leading Ohio cases.

In the case of *Nicholas vs. City of Cleveland*, 125 Ohio St. 474, the court in the fourth paragraph of the syllabus stated:

> "4. Where an affidavit for search alleges only that complaintant believes and has good cause to believe that the things to be searched for are concealed in a house or place, but does not state the facts upon which such belief is based, such affidavit and warrant issued thereunder are illegal and void under the provisions of Section 13430-3, General Code."

Further, in the case of *City of Akron vs. Williams* (1963), 175 Ohio St. 186, the Supreme Court had occasion to discuss the standards relating to probable cause for the issuance of such warrants. In such case the court held in the first syllabus as follows:

"1. An affidavit, on which a search warrant is issued, which does not state the facts upon which the affiant bases his belief that the property for which the search is to be made is located at the premises designated in the affidavit, is defective, and the search warrant issued pursuant to such a defective affidavit is invalid and void."

In such case the affidavit as executed by the officer stated "'* * * that he has personal knowledge, or knowledge from a reliable source that narcotic drugs * * *'" are kept on the premises. Such affidavit was held to be defective as failing to state facts upon which a warrant could lawfully be issued.

For a further discussion of probable cause in the issuance of such warrants, see *The State of Ohio vs. Watson* (1962), 117 Ohio App. 333.

The federal standards for probable cause, involving hearsay evidence as being the basis for the issuance of search warrants, was rather exhaustively detailed in *Aguilar vs. State of Texas* (1964), 378 U.S. 108, which standards were affirmed in *Spinelli vs. United States* (1969), 393 U.S. 410.

The Supreme Court in these cases established a dual test to be applied to an affidavit in order for such affidavit to be acceptable on the question of probable cause:

(1) The affidavit must set forth some of the underlying circumstances from which the informant concluded that the articles were where he claimed they were; and

(2) The affidavit must set forth some of the underlying circumstances and facts from which the officer concluded that the informant was reliable.

The court in *Aguilar* stated as follows:

"Although an affidavit may be based on hearsay information and need not reflect the direct personal

observations of the affiant, *Jones v. United States*, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States*, 376 U.S. 528, 84 S. Ct. 825, was 'credible' or his information 'reliable'."

The affidavit under consideration here does not measure up to the tests as set forth in *Aguilar* or *Spinelli*, *supra*, in that the language of the affidavit does not set forth what information was given to the officer by the informant, nor on what basis the informant gained such information. Following the federally mandated tests, the language "* * * Information received from an informant who has given me reliable information in the past" is insufficient to satisfy the requisite element of probable cause.

Additional issues relative to the affidavit of the officer in this case were presented by both appellant and appellee. Although not necessary to extend further discussion to any great length in that we have previously held such affidavit and subsequent warrant to be defective, we feel it important to allude briefly to some of the applicable points of law raised by the parties.

Appellant urges that the removal of the Pontiac parts, pursuant to the warrant, was beyond the scope of the warrant, and, therefore, unlawful in and of itself. Appellant relies in this regard upon *Stanley vs. State of Georgia*, 394 U.S. 557, or more specifically upon the concurring opinion of Justice Stewart in such case.

However, we find that in *Stanley*, Justice Stewart took the position that the seizure was beyond the scope of the search warrant in that the agents who were looking for

gambling or numbers material found instead some obscene films in a drawer, and that the nature or content of such films could not be determined by mere inspection, but had to be furtherly examined by rather lengthy projection.

Such concurring opinion stated that the seizure of such films was not a case "* * * where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. * * *"

Within the purview of Justice Stewart's opinion, had the search warrant here been valid in other respects, the seizure of the Pontiac parts in question would not have been unwarranted as being beyond the scope of the search in that such parts were in plain view of the officers, and with the prior knowledge by the officers of the interchanging of identification plates, such parts could reasonably have been considered as criminal evidence in the matter under investigation.

The point as made by the appellant that such items seized, i. e., the automobile parts, were in and of themselves, neither a dangerous weapon, nor were they contraband, would not be controlling upon the question of breaching the scope of the search.

Any distinction previously made between the seizure of items of evidential value only, and seizure of instrumentalities, fruits, or contraband, was rejected in the case of *Warden, Maryland Penitentiary vs. Hayden* (1967), 387 U.S. 294. Therefore the seizure of items of an evidentiary nature, as well as contraband not specifically included within the original purpose of the search, may be permissible. But as stated previously, the valid seizure of such items must be predicated upon a valid entry of the premises by the officers impounding such items.

I (b)

In its final decision on the first motion to suppress, the trial court concluded that:

"* * * The evidence shows that defendant gave consent to the search which would have cured any technical defects in the search warrant. * * *"

We feel that such a position is not supported by the law as established by *Bumper vs. North Carolina* (1968), 391 U.S. 543.

The court in *Bumper*, by way of dictum, stated:

"* * * A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. * * *"

Under the authority of *Bumper*, we hold that the consent which was obtained only after the presentment of the invalid search warrant was a product of the disclosure of such search warrant and, therefore, in effect, was not a consent to such search.

I (c)

Further, in its final decision on the first motion to suppress, the trial court held that:

"* * * the facts are such that the police had authority to enter upon the junkyard premises to make the search under Section 543.04 of the Municipal Code."

Such portion of the court's decision resulted in the conclusion that such section of the Municipal Code grants to police officers the right to go onto the premises of private garages, commercial garages, sales rooms, and junkyards to inspect for stolen cars or automobile parts, even in the absence of a valid search warrant; and the further conclusion that the search being valid, seizure of property located upon the premises, would thereby be validated.

We do not feel that such is the state of the law in the United States today.

We do not feel it necessary to decide specifically whether the cases of *Camara vs. Municipal Court of the City and County of San Francisco* (1967), 387 U.S. 523, and *See vs. City of Seattle*, 387 U.S. 541, would be applicable to, and thereby invalidate, this ordinance as it relates to the granting of authority to the police to enter private property to make a warrantless search.

But, however valid the original entry upon the premises may be held to be, pursuant to such an ordinance, it is our opinion that a subsequent search resulting in a seizure of private property cannot be held to be a lawful search and seizure in the absence of a valid search warrant.

The cases of *Camara* and *See* held unconstitutional certain sections of the Municipal Codes of San Francisco and Seattle respectively, which sections authorized public employees to enter private premises without search warrants for the purpose of inspecting the premises for building and fire regulation compliance.

We cannot be any the less concerned about the rights of an individual where an ordinance is relied upon for the seizure of private property, without following the appropriate procedures.

Based upon all of the above, we conclude that the trial court committed error in overruling the defendant's motion to suppress certain evidence.

Having so concluded that the trial court committed error in overruling the defendant's motion to suppress, a further decision must be made as to whether such error was reversible on the basis of being prejudicial.

Our conclusion is that such error was not prejudicial to this defendant. We were guided to such conclusion by statute as well as by decision.

Section 2945.83 states in applicable part:

"No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of conviction be reversed in any court because of:

"* * *

"(C) The admission or rejection of any evidence offered against or for the accused unless it affirmatively appears on the record that the accused was or may have been prejudiced thereby;"

The federal standards applicable to the determination of reversible error are set forth in *Chapman et al vs. California*, 386 U.S. 18, 87 S. Ct. 824, wherein the court held that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

Relative to Section 2945.83, Revised Code, the following comment is to be found in 4 Ohio Jurisprudence 2d, Appellate Review, Section 828, page 17:

"With respect to criminal proceedings, it has been specifically held that the provisions of Section 2945.83, Revised Code, are mandatory upon the courts, and in order to reverse a judgment of conviction it must affirmatively appear that the accused was prejudiced by the alleged errors complained of or was prevented from having a fair trial. *State v. Petro* (1947), 148 Ohio St. 473; *State v. Nevius* (1947), 147 Ohio St. 263. * * *"

We have reviewed the lengthy record very carefully with a view as to what ultimate effect such segment of the evidence would have upon the rights of this defendant.

Assuming the exclusion from the evidence of that which pertained to the 1964 Pontiac parts, as obtained in the illegal search, the remaining evidence, which was uncontradicted, inescapably leads a rational mind to but one conclusion, that of guilt.

We further conclude that the error of inclusion committed herein did not affect a substantial right of this defendant, that such was not prejudicial, and that such error was harmless beyond a reasonable doubt.

II

The appellant claims that the trial court erred in admitting testimony concerning a gun which Constance Melzer had removed from the impounded 1964 Pontiac on July 14, 1967, and that such testimony was not relevant, and had been submitted for the purpose of prejudicing the jury against the defendant.

With this argument we cannot agree, in that in reading the record we find that testimony relating to the pistol was not introduced for the purpose of prejudicing the jury against the defendant, and find that such was relevant evidence introduced for the purpose of relating the defendant, who admittedly owned such pistol, to the impounded 1964 Pontiac.

Neither prior to the trial, nor during the presentation of the State's case, had the defendant taken a stance as to the ownership, possession, or control of the vehicle. We think that for the purposes of establishing the defendant's knowledge of, or relationship with, such auto, that this testimony was proper.

III

The court, over objection, permitted a Cleveland police officer to testify as to the contents of a report of a theft of a 1964 Pontiac.

Also, Paul Gilliland, the Assistant Secretary of the National Auto Theft Bureau, was permitted by the trial court to testify to the contents of certain records of the Bureau relative to the automobiles involved in this matter. The lower court permitted the introduction of such

testimony based upon Section 2317.40, Revised Code, known as the Business Records as Evidence Act.

Further, the trial court permitted the testimony of Officer Schaub of the Highway Patrol, concerning the contents of an accident report involving Mr. John Sullivan who had been driving a 1964 Pontiac automobile.

The appellant urges that the court erred in permitting all such testimony in that in so doing, his rights under the Sixth and the Fourteenth Amendments of the Constitution of the United States had been violated in that he was denied the right of cross-examination of those who had prepared such records or reports, and, therefore, was being denied the right of confrontation of the witnesses against him.

With this proposition we cannot agree.

In the instance of Officer Schaub, testimony relating to an accident report which he had prepared, and his personal recollection of the incident, for purposes of establishing that a certain automobile belonging to a Mr. John L. Sullivan was that which was involved in the accident, was properly admitted as evidence in the trial of this matter.

The allowance by the trial court of the testimony of Mr. Paul Gilliland, on the authority that such fell within the purview of Section 2317.40, Revised Code, did not constitute error.

It is true, as asserted by appellant, that the Business Records as Evidence Act has its basic application in civil proceedings, and that there is a great distinction as to what may be permissible in a civil case, and that which may be allowable in a criminal proceeding.

But so stating such proposition does not adopt the conclusion that it is not permissible for the court in a

criminal case to avail the State of the use of such section in a proper situation.

This, unlike the case of *State vs. Tims*, 9 Ohio St. 2d 136, presents a proper or appropriate situation for the submission of such records or testimony thereon.

In *Tims*, a case involving the charge of statutory rape, the objection was raised to the introduction of hospital records showing the result of a physical examination of an alleged rape victim in the absence of the examining physician who made the examination, and whose findings were incorporated in the record offered as evidence.

The court stated in its opinion:

> "The effect of admitting hospital records in this type of case (without the examining physician being called as a witness) would be to allow the examining physician to testify without being subject to cross-examination.
>
> "The rules of civil procedure are not, therefore, applicable in a criminal case, *where such rules would serve to deprive an accused of a* constitutional right." (Inclusion and emphasis ours)

In the instant case, there was no report or testimony concerning a report offered encompassing a physical examination by a doctor, nor are we confronted with a report or record of an examination, exploration, or research of any sort. The records here involved are a compilation of cold data concerning the place of manufacture of automobiles, where such automobiles were originally shipped and sold at retail, and the compilation of theft reports on such automobiles.

The fact that such records were withdrawn as exhibits would not render the testimony thereon any less permissible.

IV

As to the fourth assignment of error relating to the claimed error of the trial court in not permitting the defendant to cross-examine the witness, Paul Gilliland, concerning the hidden numbers on the impounded car, there appears to be a very valid reason in not generally divulging the practice of the industry in this regard.

The exact location of the serial number is not germain to any issue presented in this case, and even though it were, a general location of such was stated. The fact that it was the practice of the Pontiac Manufacturing Company to place a hidden number on their automobile was corroborated by Mr. Taunt of the Pontiac Company and no serious question was raised by the defendant denying the actual existence of such a hidden number.

The fifth, sixth, seventh, and eighth assignments of error all relate to the quantum of evidence as adduced by the State, and urge that the conviction of the defendant on all of the counts in the indictment was not supported by that quantum of evidence as required by law, and, therefore, is consequently against the manifest weight of the evidence.

We find, however, after a complete review of the record, that the verdict of the jury, and the judgment thereon, as it relates to all counts is supported by the evidence beyond a reasonable doubt, and that such was not against the manifest weight of the evidence.

As to assignment number nine, we hold that the trial court did not err in overruling defendant's motion for a new trial.

The judgment of the Court of Common Pleas of Franklin County is, therefore, affirmed.

TROOP, P. J., and LEACH, J., concur.

COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

THE STATE OF OHIO,

Plaintiff,

vs.

EDWIN G. MELZER,

Defendant.

January Term, 1969

No. 44635

INDICTMENT False statement (4505.19c R.C.) (1 Count), Concealing Motor Vehicles (4549.04C R.C.) (1 Count), Motor Vehicle with Concealed Identity (4549.07 R.C.) (1 Count) and False Statement (4505.19E R.C.) (1 Count) (Total 4 Counts)

ENTRY

This day again came the Prosecuting Attorney, on behalf of The State of Ohio, the defendant being in Court in custody of the Sheriff, and being represented by Counsel, Paul Cassidy.

Thereupon being informed of the verdict of the Jury, "Guilty" as he stands in the Indictment *and being inquired of, if he has anything to say why judgment should not be pronounced against him, and having nothing but what he has already said, it is the sentence of the Court that the defendant* Edwin G. Melzer *pay the costs of this prosecution and a Jury fee of* $487.50, *for which execution is awarded, and be imprisoned in the Ohio Penitentiary and kept at hard labor but without solitary confinement for the term provided by law, and that he stands*

committed until discharged according to law. Counts #1, #2 & #4 are to be served concurrently and a $100.00. Fine on Count #3.

J. BERNARD STERN
Judge.

CERTIFICATE OF SERVICE

I, George E. Tyack, the attorney for Edward Melzer, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of , 1970, I served copies of the foregoing Petition for Certiorari on parties thereto as follows: C. Howard Johnson, Prosecuting Attorney, Franklin County, Columbus, Ohio, by certified mail, postage prepaid, return receipt requested.

GEORGE E. TYACK
Counsel for Petitioner

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Supreme Court, U.S.
FILED
FEB 4 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term 1970
No. 1144

EDWIN G. MELZER

PETITIONER

- vs -

STATE OF OHIO

RESPONDENT

BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1970
No. 1144

EDWIN G. MELZER
Appellant–Petitioner
vs
STATE OF OHIO
Appellee–Respondent

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The defendant, Edwin G. Melzer, was directly indicted by the Grand Jury of Franklin County on August 17, 1967, on four separate counts involving his possession of and actions with a 1964 Pontiac, stolen from Cleveland, Ohio. The first count charged Melzer with attempting to procure a certificate of title for the automobile knowing it to be stolen. The second count charged him with unlawfully buying or concealing the automobile knowing it to be stolen. The third count, which was a misdemeanor, charged him with possession of an auto from which the serial number was removed for the purpose of concealing the identity. The final count charged him with making a false statement in the application for certificate of title.

Melzer was arraigned on these charges on September 8, 1967, and at that time, entered a plea of not guilty to the indictment. Shortly thereafter, on September 28, 1967, cousel for defendant filed a motion to suppress "any and all property or things" seized in the course of a search on July 17, 1967, on the premises at 1632 Refugee Road by law enforcement officers.

The motion was immediately set down for oral hearing on October 27, 1967 and the defense proceeded to call a clerk of the criminal division of the Municipal Court, who had been subpoenaed, *duces tecum*, to bring with him all papers relating to search warrant No. 47. These were marked and introduced into evidence and the defense rested.

Argument was made that the affidavit for the warrant was defective and therefore the warrant could not properly issue and anything seized pursuant to such a warrant could not be admitted against defendant. Some suggestion was made that further evidence of the search could be introduced if the Court desired, but none was ever offered.

The prosecution then moved to strike the exhibit from the files since, without any evidence of a search being conducted, the exhibit was irrelevant and immaterial, (Tr. 20), and further asked that the motion to suppress be overruled for the failure to produce any evidence to show that such motion was necessary (Tr. 22).

The Court refused to rule on the motions and stated "That can be tied up and the Court will take all motions under advisement [Tr. 22]." Counsel for defendant then requested an order to continue the hearing which was granted by the Court.

Nothing further was done on the case until January 23, 1968, when the Court issued a decision holding that the search was conducted in violation of defendant's constitutional rights and sustaining the motion to suppress. Before the decision was journalized the state filed a motion to reconsider and a memorandum in support. The Court rendered a second decision on the matter on March 18, 1968, stating that it had acted because the parties were "in default," but that in fairness, it would vacate the previous decision and permit one further hearing where both parties may present evidence.

This further hearing was held on July 3, 1968. The defendant was called to present whatever further evidence he had, but he chose to rest on the evidence previously offered

and argued that it was sufficient to require the state to go forward (Tr. 27).

The state moved to dismiss the motion to suppress on the ground that there was not sufficient evidence, but the Court would not rule on this, and demanded that the state proceed with evidence. An exception to the Court's withholding a ruling was read into the record (Tr. 32), and the state then called Detective Barnett as a witness.

On direct examination, Barnett attempted to explain the information received, which formed the basis for his affidavit, but this was objected to by the defense counsel (Tr. 35). He stated, then, that after obtaining the warrant from the Municipal Court he went to 1632 Refugee Road with four other men, including two F.B.I. agents and a man from the National Auto Theft Bureau. Upon arrival, Barnett said that he went into the office and was met by the defendant, Melzer. He handed him the search warrant and also handed him a copy of Columbus Municiapl Code Section 543.04 which pertains to the right of police officers to enter garages and junk yards and inspect for automobiles believed to have been stolen.

Melzer apparently read the warrant, including the part about an informant, and said, "Why didn't you put that SB's name on there [Tr. 37]?" Melzer then said, "You don't need this. You can have anything in the place. Take anything you want[Tr. 38]." He apparently repeated this later when actual parts of an automobile were seized.

The 1965 Chevrolet which formed the basis for the search was not found, but various body parts to a 1964 Pontiac were discovered and these were taken by police. (The parts were identified at trial as coming from a car actually purchased by Melzer, as salvage, whose identification and serial number had been switched to another Pontiac, stolen in Cleveland, and found in the possession of Melzer's daughter a few days before the search.) At the time the officers departed, a receipt was obtained from Melzer by them that these items were the only items taken.

No other evidence was offered and the court reserved all

rulings. Briefs were submitted by both sides and the Court rendered a final decision on July 31, 1968, overruling the motion to suppress. The Court felt that police had authority to enter the premises under the warrant "since the judge must have been satisfied that proper grounds existed" and also under the authority of the Municipal Code section used. The Court also stated that defendant gave consent to the search, and that he did not meet the burden of showing a *prima facie*, case for suppression or proper standing even to raise the issue by showing some interest in the premises searched.

Detective William Barnett was again the first witness for the prosecution at trial. He first explained the circumstances of July 14, 1967, which caused him and his partner to first observe and then follow a 1964 Pontiac, driven by the defendant's daughter as it left the premises of Tracy Auto Parts. The vehicle was eventually stopped and the girl asked to show her driver's license and registration.

The driver's license was in her purse and she indicated that the registration was attached to the steering column. In examining the registration, Barnett observed that some numbers on the registration had been typed over and this caused him to look down at the serial plate which was attached to the door post. He saw that this was attached with what appeared to be "pop rivets" and he knew that the normal way these plates were attached was by spot welding. This made Barnett suspicious of the vehicle identification and resulted in the impounding of the car at that time.

On the same day that the vehicle was impounded, Barnett stated that he contacted Paul Gilliland of the National Auto Theft Bureau and requested that he examine it. Such examination was made on the 14th and a more thorough examination was made on the 15th by Gilliland, each time in Barnett's presence, and on the second day the confidential numbers were brought up.

At trial Gilliland testified that from his examination he determined that the car was actually one stolen from Cleveland, Ohio, from a John Gambol in August, 1966. The associ-

ation records further showed that this Pontiac had been manufactured in Pontiac, Michigan, and initially shipped to Cleveland for sale. This was verified by the official records of the Pontiac Motor Division which were introduced and by testimony from Mr. Gambol, the owner, and the Cleveland Police who investigated the theft.

The various body parts taken during the search of Tracy Auto Parts on the 17th of July, were also taken by Barnett to the impounding lot and assembled there as best possible. The lock cylinder numbers from the door and trunk were checked by both Barnett and Gilliland and were found to correspond to those assigned to the vehicle whose title and identification number were being used by the stolen vehicle being driven by defendant's daughter at her arrest.

The official factory records showed that these numbers belonged to car manufactured in Georgia and shipped to Florida for sale. Mr. John Sullivan then testified that he purchased such a 1964 Pontiac in Florida, returned to Ohio and drove it until November 1965, when it was totally demolished in an accident. He further said that he sold the scrap in January of 1966 to Melzer for $300.00, and signed the title over to him at that time.

Sullivan testified that he had nothing to do with the car again until contacted by Barnett and taken to the impounding lot in July - August of 1967. He specifically denied that the car found in Connie Melzer's possession was his car, but stated that "parts" which were taken from Tracy Auto Parts were similar in all respects to the car he sold Melzer, even to the damaged chrome strip and the Titusville sticker put on the car when he purchased it in Florida.

Donald Thompson was an employee of Melzer's at Tracy Auto Parts and was the man who originally contacted the police about the activities at the business and the various stolen cars. In regard to this matter, he testified that he first went to work for Melzer in October, 1966, and that at that time Melzer was in possession of a 1964 blue Pontiac Catalina which he was driving around with tags on it and that it looked "like it had just been

driven off the showroom floor." He also remembers at this same time that there was a green 1964 Pontiac, which was a "total loss" just sitting out on the property (Tr. 441).

In approximately March of 1967 Thompson testified that Melzer had the blue Pontiac brought into the body shop and "he walked into the big shop and he had a set of license plates and a yellow title and a little metal plate [Tr. 444]." He told another employee to hurry up and get the top of the car painted white which was done in Thompson's presence and Melzer himslef changed the vehicle identification plates on the door post and on the cowl by use of a pop rivet. Thompson also testified that subsequent to these actions and up to the time he quit, he saw Melzer using this car in the altered condition and that also up to the time he quit, the green Pontiac salvage just remained sitting in the yard.

The state also introduced the pertinent records from the Ohio Bureau of Motor Vehicles showing the chains of title of the two cars as well as the records of the county clerk showing the various applications for title and licenses. The state's final witness was a hand writing expert who testified that the writings on all the questioned documents were made by the defendant.

No evidence was submitted by the defense and no witnesses called. After arguments, the case was submitted to the jury and a verdict of guilty was returned to all four counts.

On December 9, 1969, the Court of Appeals, in a lengthy decision, affirmed the judgment of the Court of Common Pleas. The Court, however, found that the search of the premises, bases upon the search warrant obtained from the Franklin County Municipal Court, was improper but that "the error of inclusion committed herein did not affect the substantial right of this defendant, that such was not prejudicial, and that such error was harmless beyond a reasonable doubt."

The defendant appealed this decision to the Ohio Supreme Court (Case No. 70-150) but after memoranda in support of and opposing jurisdiction were filed and after arguments of counsel, the case was dismissed *sua sponte* on the basis that no substantial constitution question was involved.

QUESTIONS OF LAW PRESENTED

(1) Is the clerical ommission of the word "stolen" in the typed affidavit to obtain a search warrant which fact does appear in the warrant itself signed by the issuing judge, in the absence of any other explanation, fatal to the validity of the warrant, where the information of the whereabouts of the vehicle was obtained from a reliable informant who had previously given reliable information in the past which the affiant had verified, and the vehicle itself was specifically described, including the make, color, and serial numbers, and the place from which it was stolen? (2) Is the entry by police pursuant to the authority of a municipal ordinance upon the public portions of commercial premises for certain described articles included within the purview of the ordinance, which entry is not objected to in any way by the owner of the premises who gratuitously suggests that the officers take what they want, an unreasonable invasion of privacy prohibited by the Constitution of the United States? (3) Is the consent of the defendant valid and not the product of coercion where the police enter on the premises of defendant armed with a search warrant, later to be determined invalid, which is presented to defendant and read by him and the defendant not only does not object to the search but in fact tells the police that a warrant was not necessary and that they are free to take what they want, and the trial judge who hears the evidence finds that the defendant did consent to the searchand that the consent was freely and voluntarily given? (4) Is the allegedly erroneous admission into evidence of items unlawfully seized harmless beyond a reasonable doubt and not grounds for reversal of the conviction where the remaining evidence at trial which was uncontradicted, overwhelmingly sufficient, as found by the Court of Appeals, to establish independently the elements of the offense beyond a reasonable doubt?

LAW AND ARGUMENT

I

THE SEARCH WARRANT

It is not disputed that the affidavit for the search warrant in this case was defective on its face since there is no indication of the offense or crime necessitating the search. The affidavit, however, is not decisive of the validity of the warrant and the court or magistrate to whom it is presented may demand other and further evidence before issuing the warrant. (See Section 2933.23, Revised Code of Ohio.) Unfortunately, the record at the hearing on the motion to suppress is barren of such further information and the efforts by Detective Barnett to provide some explanation were objected to by defense counsel and not admitted.

The warrant, itself, does, however, remedy the one requisite omitted and we must assume that it was in fact only a clerical omission. The affidavit made no mention of the offense charged, in relation to the car to be searched for, but the warrant spells out not only the car and the serial number, but the fact that it was a stolen car and even gave the street address from which it had been stolen. In the absence of any other explanation, we must assume that such information was presented to the magistrate before the warrant was issued and therefore satisfies statutory and constitutional requirements.

The petitioner has also urged, and the Court of Appeals so found, that the second requirement of *Aguilar* v. *State of Texas*, 378 U. S. 108 (1964), the informant's reliability, was not met and that the statements in the affidavit were merely conclusionary. We disagree. The seeming objection in both *Aguilar* and *Spinelli* v. *United States*, 393 U. S. 410 (1969) was that the affidavits merely characterized the informant as "reliable" or "credible.." without any reason in support of the conclusion. Here the affidavit particularly states that the informer had given the affiant reliable information in the past. This should be sufficient.

In view of the specificity in the description of the car, including the serial number, and the verification of the infor-

mer's reliability, there was sufficient probable cause to issue the warrant and the warrant on its face is proper.

It is interesting to note that everybody, Melzer included, knew who the unknown informant was and on *vior dire* hearing on the second motion to suppress Detective Barnett was questioned extensively about this by defense counsel. Barnett explained that he had received considerable information in the past from the informant, Thompson, and that he at first had questions about his reliability, but that his reliability had been proven before the search warrant " by a couple of other things which has be proven to be correct [Tr. 88-92]."

II
THE MUNICIPAL ORDINANCE

At the inception of this search as police officers came up to defendant, Detective Barnett testified that he handed Melzer a copy of the search warrant and also a copy of Section 543.04 of the Columbus City Code which gives police officers the right to go onto licensed garage or junk yard premises to inspect for stolen cars or automobile parts. He explained his reasons for this because "we wanted to be doubly sure we would be -- we would take the property legally if we found the automobile we was looking for and . . . [Tr. 61]." . . "Well, in this day and age with all the Supreme Court rulings you don't know whether you are right or not [Tr. 61]."

In the final decision on the first motion to suppress, the trial court held that:

> "...The facts are such that the police had authority to enter upon the junkyard premises to make the search under Section 543.04 of the Municipal Code."

Appellant, in the Court of Appeals, argued, on the basis of this Court's decisions in *Camara* v. *Municipal Court*, 387 U. S. 523 (1967) and *See* v. *Seattle*, 387 U. S. 541 (1967), that this legislation subverted the constitutional rights of defendant and gave the officers carte blanc authority "to go into the premises and rummage about."

The Court of Appeals, in its decision, somewhat confusingly held that the trial court was incorrect in its conclusion but that

it was unnecessary to decide specifically whether *Camara* and *See* would be applicable, and thereby invalidate this ordinance as it relates to the granting of authority to the police to enter private property to make a warrantless search. Apparently, the court felt that irrespective of the validity of the original entry "it is our opinion that a subsequent search resulting in a seizure of private property cannot be held to be a lawful search and seizure of private property in the absence of a valid search warrant."

We do not see the distinction: particularly where the same court, in response to appellant's earlier questions as to the scope of the search said that: (p. 16) "...had the search warrant here been valid in other respects, the seizure of the Pontiac parts in question would not have been unwarranted as being beyond the scope of the search in that such parts were in plain view of the officers..."

A somewhat analogous problem was raised in the recent case of *Colonnade Catering Corp.* v. *United States*, 90 S. Ct. 774 (1970). There this Supreme Court found no problem whatsoever with the entry of federal agents on the private property of the licensee or with the inspection of the liquor of the premises. They held, however, that the exclusive remedy for the refusal to permit entry upon "private" commercial property was the statutory fine and not the seizure of the contraband goods. But even this was not a prohibition against seizure, as such, but a determination of the consequences of the failure to give consent by the owner.

In the instant case we do not even get to this problem. There was neither an entry into the portions of the commercial premises not open to the public nor the lack of consent. Nothing which was done here, was not also done in the *Colonnade* case and expressly approved by this Supreme Court, both majority and dissent.

The ordinance in question here pertains to a narrow class of business establishments most likely to become involved, innocently or otherwise, in trafficking in stolen vehicular merchandise, which was the only legitimate object for examination

by law officers acting in accordance with this section. The defendant does not contend that his private offices or papers were "rummaged" and the only evidence in the record pertains to a search of stacks of dissembled vehicles and parts thereof, ordinarily accessible to the public upon entry into the premises. Nothing in *Camara* and *See* prohibits such conduct not invalidates the ordinance involved.

III
THE QUESTION OF CONSENT TO SEARCH

In the final decision on the first motion to suppress, the trial court also concluded that: "The evidence shows that defendant gave consent to the search which would have cured any technical defects in the search warrant." The appellant then contended in the Court of Appeals on the authority of *Bumper* v. *North Carolina*, 391 U. S. 543, 88 S. Ct. 1788 (1968), that the consent which was obtained only after the search warrant was presented, is constitutionally invalid and in effect the product of the coercion of the search warrant and the acquiescence to a claim of lawful authority. This position was adopted by the Court of Appeals in its decision. We feel this also was incorrect.

In *Bumper*, no search warrant was ever presented and it is not clear whether the police actually had one. Mrs. Hattie Leath, the sixty-six year old negro grandmother of the defendant and the owner of the house searched, insisted that she acted from her own free will, but the majority of the Court found that where there is coercion there cannot be consent. The Court did not rule out all consent, but held that the prosecutor has the burden of proving that the consent was, in fact, freely and voluntarily give, which burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.

The situation herein is considerably different. The defendant is a large, agressive person, not easily intimidated. The evidence shows that he made a number of trips to the police station after his daughter's arrest and demanded the return of his gun. When

the police arrived and showed him the warrant, he said: "You don't need this. You can have anything in the place. Take anything you want [Tr. 38]," which statements were repeated later when various parts of the automobile were seized.

Melzer knew the informant, Thompson, and asked the police, "Why didn't you put that SB's name on there[Tr. 37]?" When the Pontiac door was found, Melzer stated that he knew why the police were there and he would tell them all about it as soon as he talked to his attorney(Tr. 512).

Obviously Melzer is a different proposition than the grandmother in *Bumper*. The mere authority of the law officers would be much less impressive and his acquiescence would certainly not be automatic. The specific distinction with *Bumper*, however, is that he did not merely agree to a search, but stated that the warrant was not necessary. The witnesses' recollection of this was vivid, and the testimony uncontradicted. The trial judge was in a unique position to evaluate the consent and to observe the participants. His decision on this point, in view of his other holdings, was unnecessary but the fact that he made it and found the way he did should be persuasive.

IV
THE QUESTION OF HARMLESS ERROR

The only items taken in this search were parts to a 1964 Pontiac which the defendant had legitimately purchase. Their possession by him of these items was in no way criminal, however, they were corroborative of the fact that he had altered the identification on a stolen car. The crime and all charges in the indictment involved only the stolen car. The existence of the wrecked vehicle and the parts undoubtedly made the case more graphic to the jury and maybe more easily understandable, but such evidence was not imperative for conviction.

There was no question that the car driven by Constance Melzer and apprehended by police on July 14, 1967, was not the car it purported to be and was in fact a stolen car from Cleveland, Ohio. This was proven by expert testimony which would have been sufficient for conviction on all the counts. The

evidence seized from Melzer was only further proof that the legitimate vehicle had not been repaired and was still sitting on his premises. These items would not be absolutely essential matters of proof and the conclusion must be that the admission of testimony about them would not be prejudicial in the overall context of the case.

There has been so much litigation involving the validity of the search, that the items taken have been magnified out of all proportion. There is still overwhelmingly sufficient probative evidence admitted, without any mention of these parts, to independently more than justify conviction beyond a reasonable doubt.

The appellant has argued that the Court of Appeals applied the wrong standard in determining whether the admission of this allegedly tainted evidence was harmless error. In support of this position he cites various language from the decisions of this Supreme Court in *Chapman* v. *California*, 386 U. S. 18, which suggests that the only criteria are whether the improper evidence was relevant and material to the case and might have contributed to the conviction.

We feel this language is deceptive. The true test and the test subsequently applied by this Court in *Harrington* v. *California*, 395 U. S. 250 (1969), is whether the evidence is overwhelmingly sufficient to independently establish the elements of the offense beyond a reasonable doubt. The Court of Appeals went far beyond this and held that the remaining evidence which was uncontradicted "inescapably leads a rational mind to but one conclusion, that of guilt." And further, that the tainted evidence did not affect the substantial right of this defendant, that such was not prejudicial, and that such error was harmless beyond a reasonable doubt.

It would seem that not only has the appellant misconceived the essence of the Court of Appeals' decision but has also misinterpreted the true standard to be applied. But what ever standard is used, the error here, if there is error, is harmless and it is harmless beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons the State of Ohio respectfully urges that the writ requested in defendant's petition be denied.

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AFFIDAVIT

STATE OF OHIO
FRANKLIN COUNTY, SS:

David H. Bodiker, being duly sworn, deposes and says that he is an Assistant Prosecuting Attorney for Franklin County, Ohio, and that a copy of the foregoing Brief in Opposition has been mailed to George E. Tyack, 8 East Broad Street, Columbus, Ohio, 43215, this day of February, 1971.

David H. Bodiker

Sworn to before me and subscribed in my presence this day of February, 1971.

Notary Public